

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Affidavit

77-6116

To be argued by
NATHANIEL L. GERBER

United States Court of Appeals

FOR THE SECOND CIRCUIT

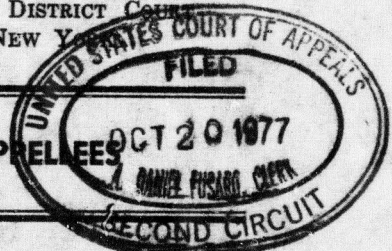
Docket No. 77-6116

VERONICA JONES and ROBERT JONES, on behalf of
themselves and all other persons similarly situated,
Plaintiffs-Appellants,
—against—

JOSEPH A. CALIFANO, Secretary of Health, Education and
Welfare; BERNICE L. BERNSTEIN, Director, Region II,
Department of Health, Education and Welfare; and JOSEPH
J. KELLY, Commissioner, Social Security Administration,
New York Region,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES



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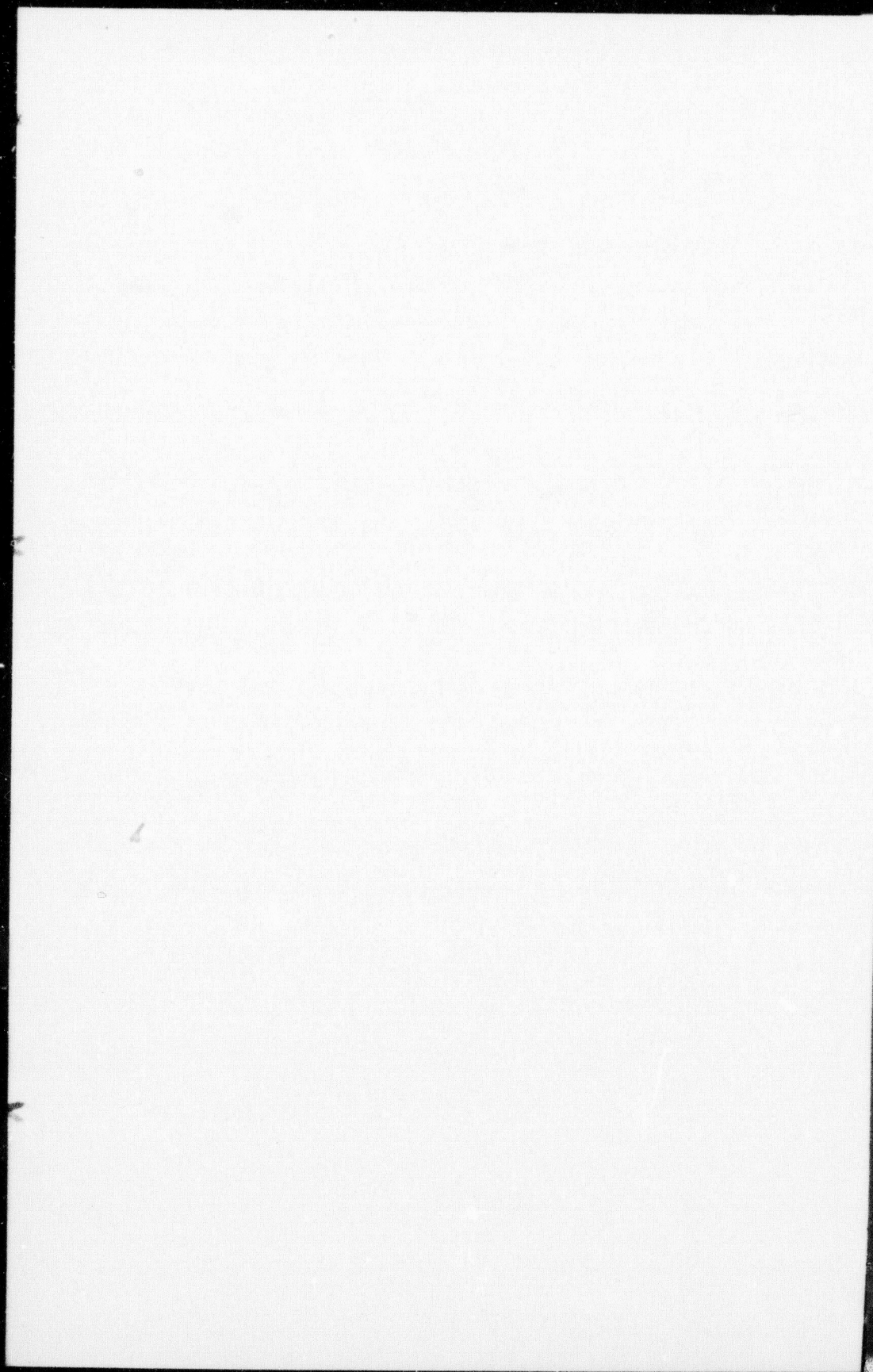


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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiffs-Appellants Veronica and Robert Jones ap-
peal from an Order of the Honorable Kevin Thomas Duffy
entered in the United States District Court for the
Southern District of New York on June 8, 1977 (R. 9-
10).^{*} The Order is predicated upon a written opinion
filed May 6, 1977, wherein Judge Duffy granted the
Government's motion to dismiss the complaint for lack

^{*} References to the Record prepared by appellants are desig-
nated "R—".

of subject matter jurisdiction and denied plaintiffs' motions for class action certification and for summary judgment (R. 1-8).

Statement of the Case

This action was commenced on October 13, 1976 as a purported class action. The named plaintiffs, Veronica and Robert Jones, are presently recipients of Supplemental Security Income ("SSI") benefits pursuant to Title XVI of the Social Security Act (the "Act"), 42 U.S.C. §§ 1381 *et seq.* (Supp. V, 1975). Veronica Jones has been receiving such benefits since June 30, 1976. Prior thereto, she was receiving benefits under the program known as Aid to Families with Dependent Children ("AFDC"), a public assistance program partially funded by the United States pursuant to Title IV of the Act, 42 U.S.C. §§ 601 *et seq.*, but administered by the State of New York (the "State"). Although Ms. Jones was not determined to be eligible for SSI Benefits until June 14, 1976, she applied for such benefits on January 30, 1976 (R. 72-73).

Pursuant to 42 U.S.C. § 1382(c)(2) (Supp. V, 1975), Ms. Jones is entitled to retroactive SSI benefits for the period of her pending application reduced by that portion of the total AFDC grant received by her and her family during that period which was properly attributable to her. As explained more fully below, inasmuch as the State administers the AFDC program, the Secretary looks to the State to specify what portion of the AFDC family grant is attributable as income to an SSI beneficiary (R. 49, 51). Where no such information is forthcoming or where, as here, the State itself uses a per capita method of attribution (R. 83), the Secretary assumes that all members of a family unit share equally in the AFDC grant (R. 49, 51).

Plaintiffs challenge the method of computation of Veronica Jones' share of the family AFDC grant which is to be deducted from her retroactive SSI benefits. They contend that the per capita method of attribution is in violation of Section 402(a)(24) of the Act, 42 U.S.C. § 602(a)(24) (Supp. V, 1975), and that in all instances the Secretary must employ a method of attribution based upon the amount of reduction of the AFDC grant that would result from removal of the SSI beneficiary from the family unit. The claim is asserted on behalf of the named plaintiffs as well as a purported class consisting of all recipients of AFDC in New York State, past and present, who have filed SSI applications and: A) received an allegedly deficient retroactive grant covering the period during which their SSI applications were being considered; or B) are presently awaiting the determination of their SSI applications (R. 13). Neither the named plaintiffs nor any member of the purported class exhausted the administrative remedies prescribed by the Act prior to bringing this action. Moreover, the named plaintiffs pursued these remedies at the same time that they sought judicial intervention by the District Court (R. 73).

On May 6, 1977, the District Court entered an opinion wherein it denied plaintiffs' motions for class action certification and for summary judgment and granted the Government's motion to dismiss the complaint for failure to exhaust administrative remedies (R. 1-8). Judge Duffy held that the exclusive jurisdictional basis for the action was Section 205(g) of the Act, 42 U.S.C. § 405(g), and that plaintiffs were not entitled to judicial review of their claim under that statute because of their failure to exhaust available administrative remedies; that this failure would similarly bar plaintiffs from proceeding under the mandamus statute, 28 U.S.C. § 1361, even if mandamus were an alternative jurisdictional predicate (R. 5-7). In so ruling, the Court observed that the

challenged action was well within the Secretary's expertise and that the utility of the exhaustion requirement was particularly apparent in this action since other SSI claimants had obtained the relief sought by plaintiffs through pursuit of their administrative remedies. Specifically, on two occasions the Appeals Council on the Social Security Administration has rejected the per capita method of attribution and ordered the use of the incremental method urged by plaintiffs (R. 41-48). Moreover, the Secretary had represented to the Court that partly in light of these Appeals Council decisions, a revision of the procedures in question was then (and is presently) under consideration (R. 7-8, 69-71).

Although the Court dismissed the complaint, it retained jurisdiction for a period of 120 days or until September 6, 1977 and provided that unless the Secretary accorded Ms. Jones an administrative hearing within that time, the Court would entertain a motion to vacate its dismissal of the complaint (R. 8, 10).^{*} On July 26, 1977, following a hearing, an administrative law judge issued a decision entirely favorable to Ms. Jones (R. 86-87). As a result of that decision, the named plaintiffs have already obtained all of the substantive relief which they sought by this action.

^{*} Inasmuch as the District Court retained jurisdiction over the action according to the terms of the order of June 8, 1977, and no final judgment has been entered since then, the requirements of Fed. R. Civ. P. 58 and 79(a) have not been fulfilled. Moreover, plaintiffs filed their notice of appeal prior to the expiration of the District Court's retained jurisdiction. However, inasmuch as the Government has not been prejudiced by these circumstances, we would have no objection to the entry of judgment *nunc pro tunc*. See *Sanchez v. Maher*, Dkt. No. 7 '539, slip op. 5743, 5747 n. 2 (2d Cir., Sept. 2, 1977).

Statutory Framework

In order to be eligible for SSI, an individual must be aged, blind or disabled, and must have income and resources not in excess of the amounts set forth in the statute. 42 U.S.C. § 1382(a) (Supp. V, 1975). If an individual, who is otherwise eligible for SSI, has income, earned or unearned, the SSI benefit rate is reduced by the amount of that income, minus any applicable income disregard, in order to determine the SSI benefit amount, if any, which is payable. 42 U.S.C. § 1382(b) (1) (Supp. V, 1975); 20 CFR § 416.1115.

The statutory definition of "unearned income" is "support and maintenance furnished in cash or kind." 42 U.S.C. § 1382a(a) (2) (Supp. V, 1975). The regulations further define "income" as "... the receipt by an individual of any property or service which he can apply, either directly or by sale or conversion, to meeting his basic needs for food, clothing and shelter." 20 CFR § 416.1102. This broad statutory and regulatory definition of income would include payments made to a claimant under the AFDC program, unless such payments were specifically excluded. The statute does not exclude AFDC payments as income. 42 U.S.C. § 1382a(b) (Supp. V, 1975).

An individual's application for SSI is effective as of the first day of the month on which it was actually filed. 42 U.S.C. § 1382(c) (2) (Supp. V, 1975). However, with certain inapplicable exceptions, until an individual is determined to be eligible for SSI, he does not begin to receive those benefits. If an SSI applicant is, during the pendency of his application, receiving AFDC, he will continue to receive AFDC until he is determined to be SSI eligible and begins to receive monthly SSI benefits. At that time, Section 402(a) (24) of the Act, 42 U.S.C. § 602(a) (24) (Supp. V, 1975), provides that the AFDC grant to the family unit of which the SSI beneficiary is a member

must be recomputed as if the SSI eligible individual were no longer a part of the family unit and that the SSI income must not be counted in determining the AFDC grant for the rest of the family unit:

[I]f an individual is receiving benefits under subchapter XVI of this chapter [the SSI program], then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits of the family under this subchapter [the AFDC program] and his income and resources shall not be counted as income and resources of a family under this subchapter;

Since an SSI application is effective as of the date of application, an SSI beneficiary is entitled to receive SSI benefits for the retroactive period (i.e. the period from the date of application to the date he begins to receive monthly SSI benefits on an ongoing basis.). However, any monthly income received during the retroactive period must be deducted from the retroactive benefits. AFDC benefits are income which must be deducted in computing the retroactive benefit amount.

The procedure used by the Secretary for determining the amount of AFDC income attributable to an SSI beneficiary for the purposes of calculating his/her retroactive SSI entitlement is set forth in Section 12340.1 of the Secretary's SSI Claims Manual.* That Section provides that Social Security District Offices responsible for processing SSI claims are to ascertain from the appropriate state agency "the amount of the AFDC payment designated to the claimant." Where such information cannot

* Section 12340.1 is set forth in full in the Addendum to this brief.

be obtained from the state, the District Office employs a per capita method of attribution and considers all members of an AFDC family as sharing equally in the AFDC grant.

Pursuant to the Secretary's policy of looking to the state, as administrator of the AFDC program, for the information necessary to a proper attribution of AFDC benefits, in the context of this litigation the Secretary looks to New York State and has adopted its attribution policy. As properly stated in the complaint, the State utilizes a per capita method of attribution (R. 83):

In determining eligibility and degree of need for an ADC [AFDC] family, it is the policy of New York State that the individual needs of each family member are equal. The needs attributable to a member of the household represent a pro-rata share of the total family needs. For example, in a four (4) person ADC household the needs of one child would be deemed to be one-quarter ($\frac{1}{4}$) of the needs of the four person ADC household.

Issues Presented

1. Did the District Court correctly dismiss the complaint for lack of subject matter jurisdiction?
2. Did the District Court correctly deny plaintiffs' motion for class action certification?
3. Has this appeal been rendered moot?
4. Is the Secretary's method of AFDC income attribution in accord with applicable statutory and regulatory provisions?

ARGUMENT

POINT I

The District Court Correctly Held That Plaintiffs Had Failed To Satisfy The Jurisdictional Requirements Of The Act.

The District Court correctly held that pursuant to the provisions of Section 205(h) of the Act, 42 U.S.C. § 405(h), Section 205(g) of the Act, 42 U.S.C. § 405(g), was the exclusive jurisdictional predicate for the action and that plaintiffs' failure to exhaust their administrative remedies, as required by Section 405(g), barred judicial review of their claim.* Plaintiffs challenge this conclusion on the grounds that Section 405(h), contained in Title II of the Act, is inapplicable to SSI claims which arise under Title XVI; that in any event, the Secretary constructively waived the exhaustion requirement by his refusal to promulgate a new regulation consistent with the Appeals Council decisions upon which plaintiffs rely; and that the mandamus statute, 28 U.S.C. § 1361, is an alternative jurisdictional basis. Each of these claims was raised below and properly rejected by the Court.

* 42 U.S.C. § 405(g) provides as follows:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

42 U.S.C. § 405(h) provides as follows:

No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28, United States Code, to recover on any claim arising under this subchapter.

1. Section 405(h) Governs the Availability of Judicial Review of Plaintiffs' Claim

Plaintiffs' claim that Section 405(h) is inapplicable to Title XVI is predicated upon the fact that Section 1383(d)(1) of Title XVI, 42 U.S.C. § 1383(d)(1) (Supp. V, 1975), which incorporates various sections of Section 405 other than subsection (h) into Title XVI, does not explicitly include Section 405(h). Section 1383(d)(1) provides as follows:

The provisions of Section 407 of this title [42 U.S.C. § 407] and subsections (a), (d), (e) and (f) of section 405 of this title [42 U.S.C. § 405(a), (d), (e) and (f)] shall apply with respect to this part [42 U.S.C. §§ 1383 *et seq.*, Part B of Title 16 of the Act, or Part B of the 'SSI program'] to the same extent as they apply in the case of subchapter II of this chapter [viz., Title II of the Act, or the 'Federal Old-Age, Survivors, and Disability Insurance Benefits program'].

It is clear, however, that Section 1383(d) deals exclusively with procedural requirements under Title XVI which are unrelated to the scope of judicial review of Title XVI claims. Indeed, the title of subsection (d) [42 U.S.C. § 1383(d)] delineates its contents as follows:

Procedures applicable; prohibition on assignment of payments; representation of claimants; maximum fees; penalties for violations.

The provisions of Section 405 which Section 1383(d)(1) incorporates are similarly limited to procedural matters unrelated to the scope of judicial review. Section 405(a)

deals with the power of the Secretary to make rules and regulations and to establish procedures; Section 405(d) authorizes the issuance of administrative subpoenas which may be judicially enforced pursuant to Section 405(e); and Section 405(f), which was repealed in 1970, dealt with the power to grant immunity from prosecution.

Thus, Section 1383(d)(1) cannot reasonably be read to define the scope of judicial review of Title XVI claims and in fact is irrelevant to that determination. Rather, one must look to Section 1383(c) of Title XVI, 42 U.S.C. § 1383(c) (Supp. V, 1975), which by its terms governs the finality of determinations of the Secretary and which establishes judicial review of Title XVI claims. Section 1383(c)(3) (Supp. V, 1975) provides as follows:

The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under Section 405 of this title.

This subsection expressly provides that judicial review of Title XVI claims is governed by Section 405 of Title II in its entirety and therefore, pursuant to Section 405(h), judicial review of Title XVI determinations may not be had pursuant to any other statute. Inasmuch as Section 405(h) precludes invocation of other statutes as alternative jurisdictional bases for claims falling within the scope of Section 405(g), a similar limitation must be read into Section 1383(c) and the scope of judicial review of Title XVI claims is equally limited by the parameters of Sections 405(g) and 405(h).

POINT III

2. Plaintiffs' Failure to Satisfy the Exhaustion Requirement of Section 405(g) Bars Judicial Review of Their Claim

Plaintiffs' claim that the Secretary has waived the exhaustion requirement, predicated only upon an unsupported and self-serving charge that the Secretary has acted in bad faith, is equally without merit.* The only arguably applicable exception to the exhaustion requirement is the Supreme Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which held that the requirement may be waived where there is a colorable constitutional claim such that an erroneous administrative determination of benefits would damage the beneficiary in a way not recompensable through retroactive payments. *Mathews v. Eldridge*, *supra*, 424 U.S. at 331.

Neither the named plaintiffs nor the members of the purported class have satisfied this condition. The named plaintiffs have not even alleged irreparable injury, as indeed they cannot. The alleged wrong—an erroneous calculation of retroactive benefits for the period January to June, 1976—is not a continuing one and occurred more than one year ago. That any damage is in fact recompensable is demonstrated by the fact that the allegedly erroneous determination has been corrected through the administrative process. Similarly, the only injury alleged

* In support of the claim of bad faith, plaintiffs' counsel states that in October, 1975 he brought a similar action which was discontinued by stipulation after the named plaintiff received a favorable decision from the Appeals Council "on the assumption that SSA [Social Security Administration] would bring its procedures into conformity with these rulings" (Appellants' Brief at 9). Review of the stipulation and order referred to (entered May 21, 1976) indicates that the action was discontinued because of the death of the named plaintiff. See *Gonzalez v. Mathews*, 75 Civ. 5270 (S.D.N.Y.)

with respect to the members of the purported class is that they are unaware of the alleged import of the Appeals Council decisions upon which the named plaintiffs rely and are, therefore, unwittingly allowing their time for administrative review to lapse. It is uncontested, however, that any member of the purported class could have obtained full administrative review of the Secretary's determination of the amount of his/her retroactive SSI benefits and that the failure to do so is not the result of any constraint or misrepresentation on the part of the Secretary.*

In any event, as demonstrated above, plaintiffs have not raised any constitutional question and challenge only the determination of the Secretary as to an award of retroactive benefits. Accordingly, for this additional reason plaintiffs do not come within the scope of the *Eldridge* exception to the exhaustion requirement. That *Eldridge* is limited to cases involving constitutional claims has been unmistakably confirmed by the Supreme Court in *Califano v. Sanders*, 430 U.S. 99, 108-109 (1977);

It is true that both cases [*Weinberger v. Salfi*, 422 U.S. 749 (1975); *Mathews v. Eldridge*, *supra*] authorized judicial review under § 205(g) [42 U.S.C. § 405(g)] of the Secretary's decision to deny or discontinue social security benefits notwithstanding the absence of a prior § 205(b) [42 U.S.C. § 405(b)] hearing. In both instances, however, the claimants challenged the Secretary's decisions on constitutional grounds. Constitutional

* As to those class members whose time has lapsed, they are barred by Section 405(g) from reopening the decision at a later date. See *Whipp v. Weinberger*, 505 F.2d 800 (6th Cir. 1974); *Estep v. Weinberger*, 405 F. Supp. 1097 (S.D.W.Va. 1976); *Hunt v. Weinberger*, 370 F. Supp. 245 (D. Hawaii 1974); *Kornfeld v. H.E.W.*, 307 F. Supp. 839 (S.D.N.Y. 1969). Accordingly, the purported class members who allegedly will suffer irreparable injury unless the exhaustion requirement is bypassed would not even benefit from the relief that might be obtained if plaintiffs were to succeed on the merits.

questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions. . . . Thus those cases merely adhered to the well-established principle, that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence.

Not only is plaintiff's claim suited to resolution within the administrative process, exhaustion of that process would not result in any irreparable injury. Accordingly, the exhaustion requirement applies and bars judicial review at this juncture.

3. Section 405(h) of the Act Bars the Invocation of Mandamus Jurisdiction.

Plaintiffs also contend that the mandamus statute, 28 U.S.C. § 1361, is an alternative jurisdictional basis for their claim and that under mandamus they need not exhaust their administrative remedies in order to obtain judicial review. As the District Court properly held, Section 405(h) of the Act precludes the invocation of mandamus. Even if mandamus were available, however, the claim would still be subject to the exhaustion requirement.

Invocation of the mandamus statute would contradict the express language of Section 405(h) and the rule in this Circuit that where the Act establishes effective procedures for review of the Secretary's decision, a Court may not review that decision by any other means. *South Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d

910, 913 (2d Cir. 1976); *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663, 666-67 (2d Cir. 1973); *Aquavella v. Richardson*, 437 F.2d 397, 402 (2d Cir. 1971); *Cappadora v. Celebreeze*, 356 F.2d 1, 4-5 (2d Cir. 1966). The rule has been confirmed by the Supreme Court in *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975) which held, albeit in the context of federal question jurisdiction, 28 U.S.C. § 1331, that Section 405(h) forecloses alternative sources of jurisdiction for claims falling within the scope of Section 405(g).

Plaintiffs challenge this rule, claiming that in *Salfi* the Supreme Court did not expressly consider the application of the forclosure provision of Section 405(h) to cases brought under the mandamus statute and that their claim that the Secretary has violated a ministerial obligation in using a per capita method of attribution warrants the conferral of mandamus jurisdiction. Neither of these observations, however, affects the conclusion that mandamus jurisdiction is barred by the terms of Section 405(h) and that plaintiffs' claim properly lies within the scope of Section 405(g).

Although the Court in *Salfi* analyzed the foreclosure provision of Section 405(h) only with respect to federal question jurisdiction (28 U.S.C. § 1331), the fact is that the plaintiff had alleged jurisdiction under Section 1361 as well. See p. 7 of the *Salfi* Appendix in the Supreme Court. It would, therefore, be illogical to conclude that the Court's holding that "[o]ther sources of jurisdiction [besides Section 205(g)] [are] foreclosed," 442 U.S. at 764, was not intended to include mandamus.

Plaintiffs' claim that the Court did not intend for its decision in *Salfi* to apply to the question of mandamus jurisdiction is predicated upon dicta in two subsequent decisions similarly involving benefit claims under the Act wherein the Court found it unnecessary to address the question of mandamus jurisdiction because the respective

plaintiffs could prevail on alternative grounds. In *Mathews v. Eldridge*, *supra*, 425 U.S. at 332 n. 12, the Court found it unnecessary to consider the claim because jurisdiction was proper under Section 405(g). Similarly, in *Norton v. Mathews*, 427 U.S. 524, 529-531 (1976), the Court found that the substantive issues raised on the appeal had already been determined and, therefore, the jurisdictional question did not have to be addressed. See also *White v. Mathews*, Dkt. No. 77-6015, Slip Op. 4715, 4720 (2d Cir., July 18, 1977).

These observations, however, while uncontested in their proper context, do not affect the unmistakeable and logical implication of the *Salfi* decision. Unlike *Eldridge*, *Salfi* was brought as a purported class action. The Court held that the unnamed members of the class did not have jurisdiction because they had failed to satisfy the exhaustion requirement of Section 405(g), the only jurisdictional predicate for the action. See *Point II, infra*. Surely the Court would not have concluded that jurisdiction did not exist for the class unless it had considered and rejected the possibility of proceeding under mandamus. In any event, since *Eldridge*, the Court has expressly held that jurisdiction does not lie under the Administrative Procedure Act ("APA") 5 U.S.C. §§ 701 *et seq.* See *Calijano v. Sanders*, *supra*, 430 U.S. at 107. Given that the right of review under the APA is broader than under mandamus*

* It is well settled that mandamus is an extraordinary remedy to be used only in the clearest and most compelling cases. *Haneke v. Secretary of Health, Education & Welfare*, 535 F.2d 1291, 1296 (D.C. Cir. 1976); *Cartier v. Secretary of State*, 506 F.2d 191 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 947 (1975). In contrast, section 10 of the APA, 5 U.S.C. § 702, defines the right of review under that Act as follows:

§ 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

and was intended to remedy shortcomings in mandamus jurisdiction, 430 U.S. at 106, the clear implication of the *Sanders* decision is, as in *Salfi*, that Section 405(g) was intended to be the exclusive source of jurisdiction for cases falling within its scope.

The fact that mandamus jurisdiction, unlike federal question jurisdiction, was never part of Section 41 of Title 28, but rather was added in 1962 as 28 U.S.C. § 1361, does not exclude it from the foreclosure provision of Section 405(h). As the Supreme Court noted in *Salfi*, *supra*, 422 U.S. at 756 n. 3:

At the time § 405(h) was enacted, and prior to the recodification of Title 28, § 41 contained all of the title's grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes.

Thus, as the Supreme Court concluded in *Salfi*, it was the clear intent of Congress in enacting Section 405(h) to preclude all other sources of jurisdiction.

The subsequent addition of Section 1361 to Title 28 does not alter that result. Two of the leading scholars on the Mandamus and Venue Act of 1962 summarize the purpose of Section 1361 as follows:

The legislative history demonstrates that the purpose of section 1361 is to confer on federal district courts outside the District of Columbia jurisdiction to review and compel official action similar to that long exercised by the federal courts within the District of Columbia. *It is equally clear that this grant of jurisdiction is not intended to expand either the availability or scope of judicial review of federal administrative action.* (Emphasis added.)

Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action," 81 *Harv. L. Rev.* 308, 318-19 (1967). See *Leonhard v. Mitchell*, 473 F.2d 709, 712, n.3 (2d Cir.), *cert. denied*, 412 U.S. 949 (1973); S. Rep. No. 1992 and H. Rep. No. 536, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S. Code Cong. & Ad. News 2784, 2785.* In light of that purpose, it simply cannot be maintained that because Section 1361 was enacted after the recodification of Title 28, Congress thereby intended to create an exception to the foreclosure provision of Section 405(b).

Plaintiff's reliance upon a series of cases against the Secretary successfully predicated upon mandamus jurisdiction is equally misplaced. See e.g. *White v. Mathews*, *supra*, *Elliot v. Weinberger*, Dkt. No. 74-1611, 74-3118 (9th Cir. July 1, 1977); *Mattern v. Weinberger*, 519 F.2d 150 (3rd Cir. 1975), *vacated*, 425 U.S. 987 (1976); *Frost v. Weinberger*, 515 F.2d 57 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976); *Jackson v. Weinberger*, 407 F. Supp. 792 (W.D.N.Y. 1976). These cases, are inapposite for they involve due process or other constitutional claims which could not be resolved through the administrative process provided by the Act. Thus in *Frost v. Weinberger*, *supra*, 515 F.2d at 61, the issue was whether due process required that the Secretary

* The legislative history of the mandamus statute clearly demonstrates Congressional acceptance of this principle:

Where a statute does not specifically provide for review of the actions of a Government official, the aggrieved party may obtain judicial review through invoking one of several nonstatutory proceedings. Which of these he chooses turns upon the relief sought. In certain cases, the relief desired can be obtained only by compelling a Government official to perform an act which he is required to do by statute but which he has nevertheless failed to do. Traditionally, the appropriate remedy in that case has been a writ of mandamus.

1962 U.S. Code Cong. & Ad. News at 2785.

grant an evidentiary hearing prior to imposing a reduction of benefits. The underlying statutory claim that the reduction was improper was not raised. The Court held that mandamus jurisdiction was available because the due process claim, the sole issue raised, was "a matter so appropriate for its decision." 515 U.S. at 62. The clear implication of the Court's holding is that where a claimant is challenging an administrative determination of benefits, mandamus does not lie and Section 405(g) is the exclusive avenue of judicial review.

Similarly, in *Elliot v. Weinberger*, *supra*, plaintiffs sought declaratory relief requiring the Secretary to provide a hearing prior to initiation of recoupment procedure against a class of beneficiaries. The Court held that the case was appropriate for mandamus jurisdiction on the theory that the issue was whether the Secretary had complied with the constitutional requirements of due process and therefore was not a claim for benefits such as would fall within the scope of Section 405(g) or the Secretary's expertise (Slip Op. at 10):

Nor are the present suits precluded by 42 U.S.C. § 405(h) which controls judicial actions to recover benefits. *Weinberger v. Salfi*, 422 U.S. 749 (1975) interprets § 405(h) to require that claims for benefits be asserted only through 42 U.S.C. § 405(g). The instant suits are quite different. They assert a constitutional right to due process notice and hearing when alleged overpayments are recouped. They are not claims for benefits. Nor would granting the relief sought result in an entitlement to benefits. The distinction between due process questions divorced from a claim for benefits and questions related to the merits of a benefits claim is a significant one, requiring considerably different treatment by the courts. See *Eldridge*, *supra*, at 329-332.

Unlike benefits cases wherein the purpose of the administrative process is served by requiring all actions to proceed through administrative review before appeal to the courts, questions of due process benefit little from administrative exhaustion. There is a need for prompt resolution of such questions, *Eldridge, supra*, at 330, and they are typically beyond the competence of the Secretary to decide. On the contrary, the development and fine-tuning of notions of due process is peculiarly the province of the courts.

Thus, while the language of § 405(h) precludes 'judicial action to recover on any *claim* arising under this subsection,' [emphasis added] it simply does not address the question of due process. Unless the question sought to be litigated is within the express language of the limiting statute, there is no basis for concluding that Congress sought to limit or preclude judicial review. *Salfi, supra*, at 761-62. [Footnotes omitted]

In *White v. Mathews, supra*, which plaintiffs contend is identical to this case, the issue was whether the Secretary has discretion to deny a reasonable opportunity for a hearing and did not affect plaintiff's claim to benefits (Slip. Op. 4721-22):

This action, on the other hand, does not affect the merits of the underlying statutory issue—whether claimants in White's class are entitled to benefits—that will ultimately be subject to the administrative process. Here, the district court was asked merely to require the agency to conduct its proceedings with reasonable speed. As will be seen below, the agency has a clear obligation under the statute to do so. . . . [T]he scope of the Secretary's discretion is the very issue before us, since we do not believe that he has discretion to deny a

reasonable opportunity for a hearing. . . . This conclusion leaves § 205(g) undisturbed as the exclusive avenue to the courts for a claimant seeking to challenge the merits of an SSA denial of benefits under the Act.

Here, however, regardless of plaintiffs' circuitous characterizations of their claim, the issue is simply whether or not the Secretary has properly calculated the amount of retroactive SSI benefits to which Ms. Jones is entitled. It is a statutory claim for benefits falling squarely within the ambit of Section 405(g).

Finally, even if the action were appropriate for mandamus jurisdiction, the exhaustion requirement would still bar judicial review. The exhaustion doctrine is equally applicable to other jurisdictional statutes including mandamus so long as the administrative remedies are adequate and their pursuit would not be futile. See *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); *Cartier v. Secretary of State*, *supra*, 506 F.2d at 199; *Martinez v. Richardson*, 472 F.2d 1121 (10th Cir. 1973); *Davis v. H.E.W.*, 416 F. Supp. 448 (S.D.N.Y. 1976); *Peterson v. Mathews*, 413 F. Supp. 687 (W.D. Pa. 1976). The administrative remedies available to plaintiffs are provided by statute and their efficacy has been proven by the favorable results of the Appeals Council decisions upon which they rely as well as the favorable administrative hearing determination which granted Ms. Jones the substantive relief which she sought by this action.

POINT II

The District Court Correctly Denied Plaintiffs' Motion for Class Action Certification.

Although the District Court did not expressly rule on plaintiffs' motion for class action certification, in dismissing the complaint for lack of jurisdiction it impliedly held that the purported class could not be properly certified. This ruling is consistent with the principle established by the Supreme Court in *Weinberger v. Salfi*, *supra*, 422 U.S. at 749, that because of the exhaustion requirement of Section 405(g), class actions are inappropriate in actions arising under that statute (422 U.S. at 764):*

"As to class members, however, the complaint is deficient in that it contains no allegations that they have filed an application with the Secretary, much

* Even if class actions were appropriate under Section 405(g), the denial of the motion would still be correct since a proper class would be limited to individuals who have satisfied the prerequisites to an action under that Section by exhausting their administrative remedies. Justice Stevens so observed in his *dissent* in *Norton v. Mathews*, *supra*, (424 U.S. 535-536):

Nor can I accept the Secretary's argument that a plaintiff class may never be properly certified in a § 205(g) action or that no class could properly be certified in this case. He contends that since § 205(g) permits review only of 'any final decision of the Secretary made after a hearing to which [the plaintiff] was a party,' it manifests a congressional intent that judicial review proceed only on a case-by-case basis. I fail to see, however, why the need for case-by-case adjudication is not fully satisfied by limiting the plaintiff class to those who have satisfied the prerequisites to an action under § 205(g). By definition, such persons have been denied relief for failure to meet the statutory requirement under constitutional attack and upon an administrative record sufficiently complete to permit judicial review. Once such persons are identified from their administrative records, relief may be granted expeditiously. [Footnotes omitted].

less that he has rendered any decision, final or otherwise, review of which is sought. The class thus cannot satisfy the requirement for jurisdiction under 42 U.S.C. § 405(g). Other sources of jurisdiction being foreclosed by § 405(h), the District Court was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal.

Even if plaintiffs could establish jurisdiction for themselves, let alone for their purported class, certification of the class would still be inappropriate. Inasmuch as the benefit of any declaratory or injunctive relief that plaintiffs might have obtained would extend to all others similarly situated, maintenance of a class action would create an unnecessary procedural burden on the Court. Under such circumstances, courts have frequently held that it is appropriate to deny class action treatment. *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir.), *cert. denied*, 417 U.S. 936 (1973); *Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission*, 490 F.2d 387, 399 (2d Cir. 1973); *McDonald v. McLucas*, 371 F. Supp. 831, 833 (S.D.N.Y. 1974) (3 judge court), *aff'd*, 419 U.S. 987 (1974); *Tyson v. New York Housing Authority*, 369 F. Supp. 513, 516 (S.D.N.Y. 1974). See also *Wells v. Malloy*, 510 F.2d 74, 76 n.3 (2d Cir. 1975).

POINT III

The Appeal Has Been Rendered Moot by the Administrative Adjudication Awarding Plaintiffs the Benefits to Which They Claim Entitlement.

Under Article III of the Constitution, federal courts have jurisdiction to decide only "cases" and "controversies". This language has been interpreted to mean that "federal courts are without power to decide questions that cannot affect the rights of the litigants in the

case before them'." *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974), quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). See *Ringgold v. United States*, 553 F.2d 309, 310 (2d Cir. 1977). Since this action was never certified as a class action by the District Court and the named plaintiffs have already received, through intervening pursuit of their administrative remedies, the substantive relief sought by this action, no decision by this Court as to the issues raised by the named plaintiffs would affect their rights. Accordingly the appeal has been rendered moot and should be dismissed.

Plaintiffs contend, however, that the appeal should be permitted to proceed under the relaxation of the mootness doctrine provided by *Sosna v. Iowa*, 419 U.S. 393 (1975), and its progeny, in particular a recent decision of this Court, *White v. Mathews*, *supra*. In *Sosna*, the Court acknowledged the possibility that special allowance may at times be necessary for claims that evaporate as the suit unfolds:

There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

419 U.S. at 402 n.11. This exception was adopted in *White v. Mathews*, *supra*, where plaintiffs, a class of disability claimants, successfully challenged the "glacial pace" at which the Social Security Administration ("SSA") adjudicated their claims. The named plaintiff obtained the desired administrative hearing before the

class had been certified by the District Court, thus ending his controversy with the SSA. The Second Circuit, relying on *Sosna*, declined to dismiss the appeal on the ground that the named plaintiff had alleged a sufficient controversy at the time he moved for class certification, that under the particular circumstances of the case application of the mootness doctrine would deprive the District Court of sufficient time "for a carefully considered ruling on the class issue" and enable the SSA to "avoid judicial scrutiny of its procedures by the simple expedient of granting hearings to plaintiffs who seek, but have not yet obtained, class certification." Slip Op. at 4723-4724.

Plaintiffs do not come within the *White v. Mathews* exception which was implicitly limited to the circumstances of that case. First, plaintiffs cannot contend that they had met the requirements of class certification at the time of their motion since the District Court properly held in denying the motion that the members of the class had failed to exhaust their administrative remedies. Since the action necessarily arises under Section 405(g), its exhaustion requirement precludes class action determination. See Point II, *supra*.

Admittedly this distinction assumes the applicability of the exhaustion requirement as precluding a class action, a proposition which plaintiffs vigorously contest. Nevertheless, even if the exhaustion requirement were inapplicable to the members of the class, equally persuasive reasons remain compelling dismissal of the appeal. First, *White v. Mathews* is by its own terms limited to the situation where the purported class was actually certified following the circumstances giving rise to mootness. The Court's concern was to allow district judges sufficient time "for a carefully considered ruling on the class

issue." Here, however, no class has ever been certified, before or after the named plaintiffs obtained their claimed relief.

More important, the underlying basis for the exception, that otherwise the issue would evade judicial review, is absent from this appeal. As the Second Circuit pointedly noted in *White v. Mathews, supra*, the issue in that case "does not affect the merits of the underlying statutory issue—whether claimants in *White's* class are entitled to benefits—that will ultimately be subjected to administrative process." Slip Op. at 4721. Rather, the issue was more fundamentally the scope of the Secretary's discretion; whether it entitled the Secretary to review plaintiffs' claims at a "glacial pace." The Secretary could therefore have permanently avoided judicial review of his discretion simply by holding the disputed disability hearing at any time prior to certification of the class. Under such circumstances, the underlying issue—whether the Secretary had exceeded his discretion—could never be reviewed either administratively, since it is not a matter falling within the Secretary's expertise, or judicially, because the mootness doctrine could always be used to circumvent such review.

Here, however, the underlying issue, whether or not the Secretary has properly calculated the amount of plaintiffs' retroactive SSI entitlement, falls squarely within the Secretary's administrative expertise. More important, the Secretary can avoid judicial review only by granting plaintiffs the very relief which they seek judicially. Therefore, in marked contrast to *White v. Mathew, supra*, plaintiffs would be deprived of the right to seek judicial review of their claim *only* insofar as that claim was satisfied through pursuit of the administrative remedies prescribed by the Secretary. Accordingly, the same reasons which underlie the requirement of administrative exhaustion as to claims falling within the Secre-

tary's expertise similarly demonstrate that the mootness doctrine should apply.

Thus in *Boyd v. Justice of Special Term, Part I*, 546 F.2d 526 (2d Cir. 1976), a purported plaintiff class sought declaratory and injunctive relief to vindicate their right to assignment of counsel in state divorce proceedings. This Court dismissed the appeal for mootness on the ground that the named plaintiffs had subsequently obtained counsel in their divorce proceedings. The Court rejected the defense similarly raised herein that the criterion of mootness should relate back to the filing of the complaint as follows (546 F.2d at 527 n. 2):

This is not a case in which certification of the class action can be related back to the date of the filing of the complaint so as to keep the controversy alive. See *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11, 95 S.Ct. 854, 43 L.Ed. 2d 54 (1975); *Sosna, supra*, 419 U.S. at 402 n. 11, 95 S.Ct. 559. The relation back exception created in *Gerstein* and *Sosna* contemplates controversies so transitory that mootness inevitably intervenes before the District Court can 'reasonably be expected to rule on a certification motion'.

Nor do we think that *Frost v. Weinberger*, 515 F.2d 57, 62-65 (2d Cir. 1975), *cert denied*, 425 U.S. 958, 96 S.Ct. 1435, 47 L.Ed. 2d 364 (1976) (Friendly, J.), requires us to apply the relation back exception in this case. A mootness problem arose there because an administrative proceeding ordered by the District Court as interim relief for the named plaintiff was concluded before the District Court completed the business of certifying the class. In the instant case the circumstances leading to mootness occurred after the District Court had dismissed it and arose as the result of independent action taken by the named plaintiffs and their counsel.

See also *Lasky v. Quinlan*, Dkt. Nos. 76-7426, 77-7032, Slip Op. 5085 (2d Cir., July 29, 1977); *Ringgold v. United States*, *supra*, 553 F.2d at 310.

The exception is equally inapplicable to the instant appeal. The circumstances leading to mootness occurred after Judge Duffy dismissed the complaint and as the result of independent action taken by the named plaintiffs and their counsel to pursue their administrative remedies, thereby obtaining the substantive relief which they had sought simultaneously in the judicial forum.* The appeal should therefore be dismissed.

POINT IV

The Secretary's Method of AFDC Income Attribution is in Accord with Applicable Statutory and Regulatory Provisions.

In its motion to dismiss the complaint in the District Court, the Government did not address the merits of plaintiffs' claim and rested instead upon the lack of subject matter jurisdiction predicated upon plaintiffs' conceded failure to exhaust administrative remedies. In light of plaintiffs' repeated and unwarranted charges regarding the Secretary's "reprensible conduct" (Appellants' Brief at 13), and insinuations regarding "the lower court's

* Plaintiffs may argue that the exception relied upon in *Frost v. Weinberger*, *supra*, 515 F.2d at 57 should also apply here on the theory that the administrative hearing which mooted plaintiffs' claim was ordered by Judge Duffy. No such analogy may be drawn. Judge Duffy did not order the Secretary to grant a hearing but rather retained jurisdiction in order to assure that the hearing was granted promptly. The Secretary has never disputed plaintiffs' entitlement to a hearing. On the contrary, the Secretary contends that plaintiffs must exhaust that and other available administrative remedies before obtaining judicial review. Thus,

[Footnote continued on following page]

incomprehensible indulgence of the defendant's bad faith" (Appellants' Brief at 15), however, we are compelled to demonstrate that plaintiffs' assessment of the merits is far from accurate and that the Secretary's method of AFDC attribution is in accord with the relevant provisions of the Act. As our decision not to address the merits below should not be interpreted as an acquiescence in the virtue of the claim, this response on the merits should not be interpreted as a waiver of our jurisdictional claim which was accepted by the District Court.

Pursuant to Section 12340.1 of the SSI Claims Manual, the Secretary's policy is to request from the responsible state agency administering the AFDC program the information necessary to determine what share of an AFDC grant should be attributed to the SSI beneficiary. Where a state provides information indicating that the attributable amount is the difference between the AFDC grant with and without the SSI individual, the computation urged by plaintiff would be used. Where, however, the state declines to furnish the requested information or, as in the case of New York State, itself utilizes a per capita method (R. 83), the Secretary assumes that all members share equally in the AFDC grant.

The Secretary's policy is to look to the State for the proper means of attributing AFDC benefits as an integral element of the State's statutory responsibility to formulate its AFDC plan and discretion in the carrying out of that

the mootness in this action has resulted from plaintiffs' pursuit of the very remedies prescribed by the Act and which the Secretary has always contended they must exhaust. In *Frost*, however, the District Judge ordered the Secretary to grant plaintiff a pre-reduction hearing, thus according her the very relief to which the Secretary claimed she was not entitled. In that case, therefore, the mootness arose not from the ordinary pursuit of administrative remedies, as occurred here, but rather from a Court order granting the very relief at issue in the action.

plan.* This policy is consistent with both the scope of the Secretary's statutory powers and responsibilities with respect to the AFDC program as well as the well established discretion of the states to administer the program, including the setting of benefit levels and the determination of what amounts AFDC eligible families may receive. The Secretary's involvement in the AFDC program is limited to reviewing plans submitted by the states for the administration of the program, which in turn must demonstrate compliance with the requirements set forth in Section 402 of the Act, 42 U.S.C. § 602. There is nothing in that section requiring that the states adopt any particular formula for attributing portions of an AFDC household grant among AFDC eligible members of that household.

The breadth of the states' discretion has been repeatedly recognized by the Courts. Thus, in *Dandridge v. Williams*, 397 U.S. 471 (1970), a group of AFDC recipients challenged a Maryland regulation imposing an upper limit on the total amount of money any one family unit could receive (a "maximum grant regulation") on the ground that it was in conflict with the equal protection Clause of the Fourteenth Amendment and Section 402(a) (10) of the Act, 42 U.S.C. § 602(a) (10).** The theory

* It is thus apparent that plaintiffs' remedy, if any, lies with the State which bears responsibility for the AFDC program at issue. In this regard, it should be noted that plaintiffs' counsel is simultaneously prosecuting a separate action in the District Court, *Sutton v. Califano*, 77 Civ. 4223 (CSH), wherein the identical claims and issues are raised. The only distinctions are the identity of the named plaintiff and the fact that the State has been named as a codefendant. Should the District Court in that action hold that plaintiff has stated a claim, it may be that satisfactory relief will be obtained from the State.

** This section requires that a state plan shall:

provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals.

of the claim was that since the standard of need increases with each additional person in the household, the imposition of an arbitrary maximum discriminates against large families and denies benefits to the younger children in a large family. Plaintiffs contended that the Maryland regulation violated the Act because such younger children are just as "dependent" as their older siblings under the Act's definition of "dependent child". The Supreme Court rejected the claim stressing the broad discretion of the State to allocate its AFDC resources (397 U.S. at 478):

In *King v. Smith*, *supra*, [392 U.S. 309 (1968)] we stressed the State's 'undisputed power', under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need'. *Id.*, at 334. We described the AFDC enterprise as 'a scheme of cooperative federalism', *id.*, at 316, and noted carefully that '[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program'. *Id.*, at 318-319.

See also *New York Department of Social Services v. Dublino*, 413 U.S. 405, 413-414 (1973).

More important, the Court held in *Dandridge* that Maryland had the discretion to establish maximum grant levels for AFDC families, and that "[s]o long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated." 397 U.S. at 481 (emphasis added). The Court expressly rejected the claim that the regulation deprived additional children of AFDC benefits since as a practical matter all members of the household share in the grant (397 U.S. at 477):

It cannot be gainsaid that the effect of the Maryland maximum grant provision is to reduce the per capita benefits to the children in the largest

families. Although the appellees argue that the younger and more recently arrived children in such families are totally deprived of aid, a more realistic view is that the lot of the entire family is diminished because of the presence of additional children without any increase in payments. . . . It is no more accurate to say that the last child's grant is wholly taken away than to say that the grant of the first child is totally rescinded. In fact, it is the *family* grant that is affected. [Emphasis in original].

Implicit in this holding is its logical conclusion that so long as a state provides some aid to all households who are eligible for AFDC, it has the discretion to determine what amounts they shall receive and therefore how any such aid paid is to be attributed among a household's eligible members. Moreover, the Court held that the addition of a member to an AFDC household without any accompanying increase in the AFDC grant does not mean that the member has been deprived of benefits. Rather, realistically speaking, all members share in the grant regardless of what portion thereof is attributable to the presence of any particular member. The clear implication of this holding is that the amount of benefits attributable to the presence of a particular AFDC beneficiary does not realistically reflect his/her share of the family grant.

Thus, it is clear that AFDC falls within the discretion of the states which have primary responsibility for its administration and that absent a violation of a specific provision of the Act, that discretion must remain undisturbed. In order for plaintiffs to prevail, they must demonstrate that the State's per capita method of attribution violates a specific section of the Act. This they cannot do, for so long as all AFDC eligible individuals and households receive some benefits, the setting of benefit levels, including the attribution of benefits among

eligible members of an AFDC household, rests within the State's discretion. In any event, the incremental method of attribution urged by plaintiffs is, as the Court observed in *Dandridge*, an unrealistic assessment of the beneficiary's share of the AFDC grant or of the benefit which he derives therefrom.

The only provision even remotely related to attribution of AFDC benefits is Section 402(a)(24), 42 U.S.C. § 602(a)(24) (Supp. V, 1975), which mandates that an individual who begins to receive SSI benefits may no longer be considered a member of an AFDC household for the purpose of calculating the amount of AFDC benefits to which the family remains entitled. Plaintiffs contend that this section, which is addressed to the states and intended only to prevent an SSI beneficiary from simultaneously continuing to receive the benefit of the AFDC grant, also obligates the Secretary to utilize an incremental method of attributing AFDC benefits even though the State itself regards all members of an AFDC household as sharing equally in the AFDC grant.

In fact, that section, the only provision of the Act upon which plaintiffs rely, lends no support to their claim. It merely states that once an individual begins to receive SSI, he/she may no longer be counted as a member of an AFDC household for purposes of computing the amount of its subsequent AFDC entitlement. Its purpose is clearly *prospective* and limited to precluding an SSI beneficiary from simultaneously continuing to receive the benefits of AFDC. It does not and was not intended to prescribe the means of attributing AFDC for the purpose of calculating the amount of an SSI beneficiary's *retroactive* SSI benefit.

Plaintiffs' reliance upon various administrative and judicial precedents is equally misplaced. The adminis-

trative adjudications (R. 41-48, 8-87), while of value in formulating agency policy, do not constitute a rule or regulation binding upon the Secretary. As stated by the Supreme Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-766 (1969):

Adjudicated [administrative] cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. See H. Friendly, *The Federal Administrative Agencies* 36-52 (1962). They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process they may serve as precedents. But this is far from saying . . . that commands, decisions, or policies announced in adjudication are "rules" in the sense that they must, without more, be obeyed by the affected public [Footnote omitted]

See also *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 264-266 (1975); *Public Interest Research Group v. F.C.C.*, 522 F.2d 1060, 1066 (1st Cir. 1975), *cert. denied*, 424 965 (1976); *F.T.C. v. Crowther*, 430 F.2d 510 (D.C. Cir. 1970); *N.L.R.B. v. A.P.W. Products Co.*, 316 F.2d 899 (2d Cir. 1963).

The judicial precedents, while they correctly reflect the import of 42 U.S.C. § 602(a) (24), are no more supportive of plaintiffs' claim than is the provision which they interpret. In *Nelson v. Likins*, 389 F. Supp. 1234 (D. Minn. 1974), *aff'd*, 510 F.2d 414 (8th Cir. 1975), plaintiffs contested Minnesota's policy of considering an SSI recipient as a member of an AFDC household and its resulting reduction in the level of the AFDC family grant. The Court held that Minnesota's policy was in violation of 42 U.S.C. § 602(a) (24), which requires that

an SSI beneficiary not be treated as a member of an AFDC household for purposes of computing the AFDC grant. Thus, the sole issue before the court in *Likins, supra*, was the status of an SSI beneficiary with respect to the prospective calculation by the state of the beneficiary's household's AFDC entitlement. The same issue was raised and decided in like manner in *Duval v. Philbrook*, CCH Pov. L. Rep. ¶ 23, 145 (D. Vt. 1976) and *Barton v. Lavine*, 389 N.Y.S. 2d 416 (App. Div. 3d, 1976).

While it may be arguably logical to consider the attributable amount of AFDC to be the difference between the grant with and without the SSI beneficiary, that result is clearly not mandated by 42 U.S.C. § 602(a) (24). The plain and clear meaning of that statute is that SSI beneficiaries may not simultaneously receive AFDC and therefore may not be counted prospectively as a household member for AFDC purposes. There is nothing in the statute prescribing how a state must attribute AFDC already paid to a household among its members who *are* eligible for those benefits, a matter falling within the states' well settled discretion. Inasmuch as this provision is the only one upon which plaintiffs rely, they have failed to establish that the Secretary's policy is in violation of the Act.

CONCLUSION

The Judgment of the District Court should be affirmed.

Dated: New York, New York
October 19, 1977

Respectfully submitted,

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ADDENDUM

Section 12340.1 of the Secretary's SSI Claims Manual provides as follows:

(a) *Status of Payments*

AFDC payments (aid to Families with Dependent children) are unearned income based on need. The individual who may be eligible for both of these programs (SSI and AFDC) has the right to elect the program of his/her choice. When an AFDC recipient (including one in *foster care*) applies for SSI payments, the AFDC payments made for the claimant during the months for which the individual is later determined to be eligible for SSI are unearned income to the individual and reduce the SSI payment dollar for dollar; i.e., the SSI payment is reduced only until the discontinuance of the AFDC payment. (See § 12402(b) and § 12413 regarding the effect of AFDC payments on deeming.)

Also under the AFDC program *foster care* payments actually constitute a payment to the individual for whom they are made even though the money is received by the foster parent(s). Unlike foster care payments under other programs, AFDC foster payments are not subject to a presumed maximum value as described in § T12349.32. The full amount of any AFDC payment constitutes unearned income to the individual. Since these payments are income based on need, they are not subject to the \$20 general income exclusion.

(b) *Development*

The State or county agency administering the AFDC is generally expected to advise the eligible individual of the option to elect coverage either under the SSI or the AFDC program. When the AFDC recipient applies for SSI, decides on cover-

age under SSI rather than AFDC, and is determined to be eligible, notify the AFDC agency of the individual's decision to change programs. Use Exhibit 13, § 7399, "Voluntary Disclosure to State Agency (UC and PA)," to provide the AFDC agency with the needed information.

Advise the applicant recipient that his SSI payments will be reduced dollar for dollar prior to termination of AFDC payments and that he must notify the DO when the AFDC payments for him stop. Telephone the AFDC agency and advise that a notice is being sent about the individual's eligibility for SSI. Ask the agency to indicate the date AFDC payments will terminate. Record the response on an RC. If the agency is unable to furnish this date immediately, followup at 30 day intervals. If the individual brings in a notice from the AFDC agency which specifies the date the AFDC payment stops, use that as evidence.

Methods for determining the AFDC payments are not the same in all States. In some States, for example, the AFDC grant may be greater for the first eligible child with differing amounts for each additional child. Other States may have a flat maximum payment for a family, without reducing the AFDC payment amount when one or two family members are removed from the grant. Still other States can tell, although a breakdown of what is each individual's share in the AFDC grant cannot be provided, what the family grant will be when a disabled child is removed from the AFDC grant. Also, the caretaker relative, who may or may not be a parent, may not be included in the AFDC grant, etc.

It is important to verify if the claimant is included in the AFDC payment and to determine the amount of the AFDC payment designated to

the claimant. If the claimant has evidence of his/her designated share of the AFDC payment, (e.g., copy of the agency's letter showing the amount designated to the claimant), retain or copy the evidence and use the designated share.

If not, contact the administrative agency and record the available information on an RC. If neither of these approaches is successful, use the per capita method. This method divides the *verified* total AFDC payment received by the family by the *verified* number of the persons included in grant.

EXAMPLE: The verified AFDC grant is \$240 a month for a family of four and the claimant is an AFDC recipient. Neither the claimant nor the administering agency could provide a breakdown of the AFDC payment. In this case, use the per capita method, dividing the total amount of the AFDC grant by four (\$60 for each person in the grant) to determine the claimant's AFDC payment.

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the _____
two copies
_____ 20th day of _____ October 19 77 she served /~~xxxxxx~~ of the
within Brief for Defendants-Appellees

by placing the same in a properly postpaid franked envelope addressed:

Lloyd Constantine, Esquire
Brooklyn Legal Services
Corporation "B"
152 Court Street
Brooklyn, New York 11201

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

20th day of October, 19 77

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978